SHORT FORM ORDER **INDEX NO. 621778/2019**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

JOHN FERNANDEZ,

Plaintiff,

-against-

ALEXANDRA M. BARBERA and PAULINE P. BARBERA,

Defendants.

ORIG. RETURN DATE: JUNE 8, 2020
FINAL SUBMISSION DATE: NOVEMBER 5, 2020
MTN. SEQ. #: 001
MOTION: MD

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Upon the following papers numbered 1 to 6 read on this motion FOR PARTIAL SUMMARY JUDGMENT. Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Reply Affirmation 6; it is,

ORDERED that this motion by plaintiff JOHN FERNANDEZ for an Order, pursuant to CPLR 3212, granting plaintiff summary judgment on the issue of liability, dismissing defendants' first affirmative defense of comparative negligence and fifth affirmative defense of a sudden condition that could not have been reasonably anticipated; and, pursuant to CPLR 3212 (c), scheduling an immediate trial on the issue of damages, is hereby **DENIED** for reasons set forth hereinafter. The Court has received opposition to this motion from defendants ALEXANDRA M. BARBERA and PAULINE P. BARBERA.

This action stems from a three-vehicle, rear-end collision that occurred on October 5, 2019, at or near the intersection of Old Nichols Road and Elliot Drive, in the Town of Smithtown, County of Suffolk, State of New York. At the time of the accident, plaintiff alleges that he was operating his 2002 Lexus

motor vehicle which was fully stopped when it was struck in the rear by a vehicle owned by defendant, PAULINE P. BARBERA, and operated by defendant, ALEXANDRA M. BARBERA. Plaintiff alleges that he was stopped while waiting for a stopped vehicle in front of him to make a left turn when he was rear-ended by defendants' vehicle.

Plaintiff has now filed the instant motion for summary judgment on the issue of liability. On a motion for summary judgment the Court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2007]; *Kolivas v Kirchoff*, 14 AD3d 493 [2005]). Therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573 [2004]; *Roth v Barreto*, 289 AD2d 557 [2001]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2001]). The failure of the moving party to make such a *prima facie* showing requires denial of the motion regardless of the insufficiency of the opposing papers (*see Dykeman v Heht*, 52 AD3d 767 [2008]; *Sheppard- Mobley v King*, 10 AD3d 70 [2004]; *Celardo v Bell*, 222 AD2d 547 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v New York*, 49 NY2d 557 [1980]). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (*see Zuckerman v City of New York*, *supra*; *Blake v Guardino*, 35 AD2d 1022 [1970]).

When the driver of an automobile approaches another vehicle from behind, it is the duty of the driver of the rear vehicle to maintain a reasonably safe rate of speed and control over his or her vehicle, to maintain a safe distance between his or her vehicle and the other vehicle, and to exercise reasonable care so as to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law § 1129 [a]; *Klopchin v Masri*, 45 AD3d 737 [2007]; *Gaeta v Carter*, 6 AD3d 576 [2004]; *Chepel v Meyers*, 306 AD2d 235 [2003]). A rear-end collision creates a *prima facie* case of negligence on behalf of the operator of the rear vehicle, and imposes a duty on that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see Niyazov v Bradford*, 13 AD3d 501 [2004]; *Stalikas v United Material*, 306 AD2d 810 [2003], *aff'd* 100 NY2d 626 [2003]; *Ruzycki v Baker*, 301 AD2d 48 [2002]; *Niemiec v Jones*, 237 AD2d 267

[1997]). Furthermore, a plaintiff is no longer required to demonstrate his or her freedom from comparative fault in order to establish a *prima facie* entitlement to summary judgment on the issue of liability in a car accident case (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Otella v Rodriguez*, 165 AD3d 826 [2018]).

Based upon the adduced evidence, the Court finds that plaintiff has established *prima facie* that he is entitled to judgment as a matter of law on the issue of liability against defendants (*see Winegrad v New York Univ. Med. Ctr.*, *supra*; *Vaden v Rose*, 4 AD3d 468 [2004]; *McNulty v DePetro*, 298 AD2d 566 [2002]). As discussed, plaintiff contends that his vehicle was struck in the rear by defendants' vehicle while completely stopped.

However, in opposition, defendants have proffered a potentially non-negligent explanation for the happening of the accident. Defendant ALEXANDRA M. BARBERA avers that:

> As I approached the intersection of Nichols Road and Elliot Drive, I suddenly observed the brake lights on the plaintiff's vehicle illuminate and the plaintiff come to an abrupt stop. At that moment I was still 1-2 car lengths behind the plaintiff's car. Upon seeing the brake lights on plaintiff's vehicle, I immediately took evasive action by stepping on my brakes and attempting to steer to the right, but due to excessive sand on the road, my car skidded and struck the rear of the plaintiff's vehicle. I did not observe the sand on the road until after the accident occurred.

Although an assertion that the lead vehicle came to an abrupt stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the operator of the rear vehicle (*see Perez v Persad*, 183 AD3d 771 [2020]; *Buchanan v Keller*, 169 AD3d 989 [2019]; *Brothers v Bartling*, 130 AD3d 554 [2015]), an assertion of an abrupt stop with unavoidable skidding has been held to be a non-negligent explanation for the happening of a rear-end accident (*see Clements v Giatas*, 178 AD3d 894 [2019]; *Miller v Steinberg*, 164 AD3d 492 [2018]; *Orcel v Haber*, 140 AD3d 937 [2016]; *Briceno v Milbry*, 16 AD3d 448 [2005]). Moreover, "[e]vidence of skidding out of control is only *prima facie* evidence of negligence on the part of the driver, it does not mandate a finding of

negligence. Such evidence, together with the explanation given by the driver, presents factual questions for determination by the jury" (*Vadala v Carroll*, 91 AD2d 865, 865 [1982]; *see Copeman v Moran*, 236 AD2d 507 [1997]; *Zimmermann v Spaziante*, 143 AD2d 745 [1988]). Here, without passing on the merits of the defense, the Court finds that defendants have proffered a potentially non-negligent explanation for the happening of the accident.

Accordingly, plaintiff's motion for summary judgment against defendants on the issue of liability is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: November 25, 2020

HON. JOSEPH FARNETI
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**